

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1084 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.S.PARIKH

and

Hon'ble MR.JUSTICE KUNDAN SINGH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

M/S. FG CONSTRUCTION & COMPANY

Versus

AMC

Appearance:

MR RM VIN with MISS MAYA BHAVNANI for Petitioner
MR BP TANNA for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and

MR.JUSTICE M.S.PARIKH
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 30/06/2000

JUDGEMENT [Per M.S. PARIKH, J.]

1. The appeal has been placed for hearing before the
Larger Bench in the following circumstances :

2. The present First Appeal arises from the dismissal of the suit bearing Civil Suit No. 446/1990 filed by the appellant in the City Civil Court at Ahmedabad for recovering Rs.69,190=94, with running interest and cost from the defendant Corporation. The suit as originally filed was in the name of M/s. F.G. Construction & Company, a registered partnership firm, and the plaint was signed on behalf of the firm by Iqbal Husein Haji N. Mistry as claiming to be one of the partners of the firm. Subsequently, the designation of the said signatory was changed to that of Manager as per order below Exh. 36 passed by the trial Court on 16/2/1984. Thereafter, in view of objection raised by the Corporation, a further order below Exh. 45 dated 12/10/1984 was passed by which two persons were permitted to sign the plaint as partners. They were Fulmohmed Gulabkhan Mistry and Mustaq Gulabkhan Mistry. The plaintiff produced an extract from the Register of Firms showing entry dated 17/4/1967, according to which said Fulmohmed Gulabkhan joined the partnership firm on 1/4/1966. The defendant resisted the suit inter-alia asserting that it was not maintainable on account of the provisions of section 69 of the Partnership Act. Various issues were framed, out of which issues nos. 6A and 6B related to maintainability of the suit. They would read as under :-

"6A. Whether the present suit is not
maintainable as the plaint has not been
signed by any of the partners of the
plaintiff-firm ?

6B. Is the suit of the plaintiff firm barred
under the provisions of the Indian
Partnership Act, 1932 ?"

The aforesaid issue no. 6A reflected the controversy between the parties in the light of the original position in the plaint where Iqbal Husein Haji Nazirkhan Mistry signed the plaint as the partner of the firm, but

subsequently his designation was changed to that of Manager. As noted earlier two admitted partners of the firm were also permitted to sign the plaint as partners pursuant to the order below Exh. 45. In the light of this development, issue no. 6A was answered by the learned trial Judge in favour of the plaintiff. However, so far as issue no. 6B was concerned, the finding reached by the learned trial Judge was against the plaintiff. It would appear that after the above issues were struck, the plaintiff's evidence was recorded. Iqbal Husein who had also signed the plaint as a partner of the firm and whose description changed as Manager of the firm entered the witness box testifying at exh. 53 on 9/9/1985 that he was not the partner of the plaintiff firm, but there were only two partners of the firm, namely, Fulmohmed Gulabkhan Mistry and Mustaq Gulabkhan Mistry and that he was only the Manager of the firm. However, subsequently by application exh. 99 the defendant-Corporation sought leave of the Court to produce certified copy of the entry from the Register of Firms in connection with the partnership firm in question, viz. list Exh. 101. The said entry recited that on 30/1/1985, as per the parties' application Iqbal Husein Mistry of Mirzapur, opposite St. Xavier School was stated to have joined the firm as a partner on 1/4/1974. While accepting the validity of the entry the trial Court observed that the evidence on the side of the defendant was being recorded at that stage and that if the plaintiff wanted to recall any of the witnesses or wanted to call any of the witnesses for explaining the entry the plaintiff would be at liberty to do so. Such further evidence, however, was to be strictly limited for explaining the document. With such limited liberty to the plaintiff, production of the aforesaid certified copy of the entry exh. 101 was allowed and received in evidence. It might be noted that despite the liberty so reserved to the plaintiff, no effort was made on the side of the plaintiff to explain the document exh. 101 and, therefore, the entry remained as such appearing at exh. 101. At the stage of the arguments before the learned trial Judge, written arguments were submitted by the plaintiff at exh. 114. A definite stand there was taken in the last paragraph that Iqbal Hussein had been taken up as a partner with effect from 1/4/1974 and accordingly entry was made to that effect on 31/1/1985. In view of this definite stand in the written arguments exh. 114 it was the case of the plaintiff itself that on the date of cause of action and on the date when the suit was filed in the trial Court on 7/2/1980 the plaintiff firm consisted of three partners viz. Iqbal Hussein, Fulmohmed Gulabkhan Mistry and Mustaq Gulabkhan Mistry,

but the suit was filed only by Iqbal Hussein Mistry whose name was not mentioned in the register of Registrar of Firms. The trial Court therefore dismissed the suit by the impugned decree holding that the provisions of section 69 (2) of the Partnership Act were not complied with, giving rise to the present appeal.

3. The appeal was placed for disposal before the Division Bench of this Court. It is in the background of the aforesaid facts that following question arose before a Division Bench comprising S.B. Majmudar, J. (as he then was) and I.C. Bhatt, J.

"Whether the plaintiff's suit was maintainable in view of provision contained in section 69(2) of the Partnership Act ?"

It was submitted before the Bench that The Bharat Suryoday Mills Co. Ltd. v. Mohatta Brothers reported in 10 G.L.R. p. 457 on which the trial Court placed reliance, was reversed by the Apex Court in the case of Mohatta Brothers v/s. The Bharat Suryoday Mills reported in AIR 1976 S.C. 1703 and although no opinion was expressed on the interpretation of section 69 (2) of the Act, the view of this Court in Bharat Suryoday's case was rendered nugatory and obiter. The referring Bench accepted this argument, but proceeded to make reference to a Larger Bench in view of the fact that the view that was expressed by the Division Bench of this Court in Bharat Suryoday's case was endorsed, by another Division Bench of this Court in First Appeal No. 65/1978 decided on 18/10/1978 by M.P. Thakkar and S.B. Majmudar, JJ (as Their Lordships then were).

Mr. Vin, learned counsel for the plaintiff canvassed Order 30 of the Code of Civil Procedure, which provides convenient mode of filing suits by or against firms and persons carrying on business in the names other than their own. It was submitted that the two partners who were subsequently permitted to sign the plaint were persons suing on behalf of the registered firm and as their names appeared in the Register of Registrar of Firms, the suit was not hit by the bar created u/S. 69(2) of the Partnership Act. He also placed reliance upon decisions contained in the case of M.A. Hussein V/s. P.V.G.K. and Brothers reported in 1970 Mysore, 299 and Purashotam & Co. vs. R.R. Brothers reported in AIR 1973, Patna p. 300, taking a contrary view and essentially holding that second condition of section

69(2) of the Act consists of two alternatives and it would be enough if one of them is fulfilled. These alternatives are (1) that the persons suing must establish that they are partners or (2) that they are persons whose names are shown in the Register of Firms as partners. It was submitted that where the suit is by the firm or all the partners of the firm, it would not be necessary to establish that names of all the partners of the firm have been shown in the Register of Firms.

In our considered opinion it is not necessary to resolve the legal position attending the aforesaid two decisions of this Court vis-a-vis the decisions of the Mysore High Court and Patna High Court respectively in M.A. Hussein's case (supra) and Purshotam & Co.'s case (supra), because for the purpose of disposing of the First Appeal and for that matter the present Reference the second part of the factual matrix noted hereinabove clinches the issue. It can be seen from the said set of facts that neither of the two partners who were shown in the Register of Firms and who were permitted to sign the plaint at a later stage, signed the plaint when the suit was instituted. The person who signed the plaint was in fact one of the partners of the firm but his name was not mentioned in the Register of Firms. In that background the provision of section 69(2) of the Act might be considered. That provision would read as under:-

"69. (1) xxx xxx xxx xxx

(2) No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

5. The plaintiff's suit is clearly hit by the above provision as per the aforesaid set of facts. The submission that as the two partners, namely Fulmohmed Gulabkhan Mistry and Mustaq Gulabkhan Mistry were permitted to sign the plaint as per order below exh. 45 dated 12/10/1984, the requirement of the aforesaid provision would stand complied with has no merit. Now, it might be noted that the above two persons shown as partners in the Register of Firms did not sign the plaint on the date of the filing of the suit. Therefore, they were not the persons suing as required by the aforesaid provision of law. Thus, there was initial defect in the institution of the suit and the bar of section 69(2) of

the Act clearly attached. The proposition that such initial defect cannot be cured by subsequent signing of the plaint has now been settled in the case of Delhi Development Authority v/s. Kochhar Construction Work reported in (1998) 8 S.C.C. 559. It so happened that an unregistered firm filed proceedings u/S. 20 of the Arbitration Act, 1940 in the High Court of Delhi. After the learned Single Judge allowed the suit, the Division Bench of the said High Court dismissed the First Appeal holding that subsequent registration of the firm cured the initial defect since that was within the period of limitation. In appeal by Special Leave the Supreme Court held that in the light of the plain language of section 69 of the Act and in view of the earlier decision of the Court in the case of Shreeram Finance Corporation v/s. Yasin Khan reported in (1989) 3 S.C.C. 476 the proceedings u/S. 20 of the Arbitration Act were ab-initio defective since the firm was not registered and the subsequent registration of the firm cannot cure that defect. In our considered view, therefore, the defect in filing of the present suit by the plaintiff firm through a person who was not shown in the Register of Firms and who ultimately described himself as the Manager of the plaintiff firm would be in violation of the aforesaid provision of the Act and signing of the plaint by the existing partners shown in the Register of Firms at the later stage of the suit as aforesaid, can hardly cure that defect in view of the aforesaid settled legal position.

In the result, without expressing any opinion on the question referred to the Larger Bench, it has to be found that the suit as filed by the plaintiff initially will not be maintainable at law. While answering the Reference accordingly, we dismiss the appeal with no order as to costs.

* * *

PVR.